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LANDMARKS:

THE OIL PLATFORMS OPINION: AN ELEPHANT IN THE EYE OF A NEEDLE

*Geoff Gordon**

Introduction

The *Case Concerning Oil Platforms*, known principally for the contribution therein to the law on use of force and self-defence, is overlooked for the discussion among its judges of a fundamental question: What is the role of the International Court of Justice (further: ICJ, or Court) in the international system?[1] The eleven separate opinions attached by the judges to the Court's decision suggest the contentiousness of the discussion. Moreover, the case was deceptively complex: a complaint about freedom of commerce according to a bilateral Treaty of Amity was really a controversy over the use of force and self-defence among sworn enemies; and while the record before the Court was limited to specific incidents from the late 1980's, the various judges appear to have drawn substantially, in some cases expressly, on the public record of world affairs at the beginning of the 21st century. In the process, the collection of opinions captures strikingly different visions of the ICJ, its powers and its mandate.

This case note progresses in four brief parts. First, I address the factual background for the decision. Second, I turn to the jurisprudential controversy among the various judges. Third, I review the substance of the Court's decision on use of force. Finally, I focus on the separate opinion of Judge Simma and his articulation of *Rechtspolitik*, as a key to understanding the competing roles for the ICJ contemplated by the several judges. I conclude by drawing out the relevance of the dispute among the judges with reference to a subsequent ICJ case, the *Wall* Advisory Opinion, and the ongoing violence in Gaza.

I. Background

The heart of the record before the court pertained to two separate incidents. First, on 19 Oct., 1987, the United States military struck Iran's *Reshadat* oil installation, damaging platforms connected to that and another complex, the *Resalat*. The attack followed an assertion by the United States of the right to self-defence in the wake of various actions attributed to Iran, particularly a missile attack on 16 Oct., 1987, destroying a Kuwaiti oil tanker, the *Sea Isle*

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[1] *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), 2003 I.C.J. 161. Hereafter, reference will be to Opinion, or to the name of the responsible Judge in the case of the attached opinions, followed by paragraph or page number.

City, recently reflagged to the United States.[2] Second, on 18 April, 1988, as part of a wider operation, the United States military struck and damaged two more Iranian oil installations, the *Salman* and *Nasr* complexes. The operation again followed an assertion by the United States of the right to self-defence pursuant to various actions attributed to Iran, particularly a mine that struck and damaged the U.S.S. *Samuel B. Roberts* on 14 April, 1988, wounding members of the crew.[3]

The incidents took place in the wider context of the Iran-Iraq War, between 1980 and 1988. While the history of the Iran-Iraq War is long and sordid, the record before the Court focused on relatively narrow aspects. The two incidents at the heart of the case were part of the so-called *Tanker War* escalation. As of 1984, both Iran and Iraq began targeting neutral shipping in the Gulf in an effort to disrupt one another's trade. The Kuwaiti vessel involved in the first incident, the *Sea Isle City*, had for this reason reflagged under the United States, a protective practice in the region that included British and Soviet participation. Waters of the Gulf were mined by both Iraq and Iran, and Iran stood accused, among other things, of using its oil installations for military purposes, including intelligence and weapons deployment. Before the ICJ, Iran acknowledged a military presence on its oil platforms, but insisted the purpose was purely defensive.[4]

The Court delivered its opinion in the wider context of a different conflict with Iraq, the 2003 United States invasion. Equally significant was the still-broader War on Terror following the attacks of 11 Sept., 2001, pursuant to which the United States had released the 2002 National Security Strategy (NSS). The NSS announced the Bush Doctrine, asserting an unusually broad, unilateral right to engage pro-actively in anticipatory self-defence. The separate opinions exhibit varying degrees of concern for the contemporaneous legal atmosphere. Judge Rigaux, for instance, concludes his opinion with critical remarks on the state of U.S. legal scholarship, and briefly tours "outdated" Hobbesian political philosophy to denounce in its resurgence the spectre of unbridled violence.[5] Judge Simma is at once less polemical and more comprehensive, calling openly for a *Rechtspolitik* statement in support of increasingly marginalised international rules limiting the use of force. I return to this discussion, below.

The procedural history of the case begins in 1992, when Iran first filed suit with the ICJ. Though the gravamen of the complaint pertained to the military actions of the United States as a peripheral actor in the Iran-Iraq War, Iran brought its suit on other grounds: provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (Treaty of Amity, or Treaty). The Treaty of Amity provided for automatic

[2] Opinion, paras. 46-48.
[3] *Idem*, paras. 65-68.
[4] *Idem*, paras. 23-24, 60, 74-75.
[5] Rigaux, paras. 31-33.

arbitration before the ICJ – the only international forum available to Iran, and only available, given the Court's otherwise-applicable limitation to consensual jurisdiction, on the terms of the Treaty of Amity. In 1996, by preliminary judgment, the Court allowed the suit to proceed pursuant to a single provision of the Treaty of Amity, namely Art. X, paragraph 1, providing for freedom of commerce and navigation between the territories of the two contracting parties. Provisions suggesting broader terms for complaint were rejected as incapable of conferring legitimate grounds for action.[6] In 1998, the Court allowed the United States to proceed with a counterclaim on the same Art. X (1), based on Iran's activities during the *Tanker War*.[7]

II. Jurisdictional Controversy

The case thus went forward before the ICJ as a matter concerning alleged infringement of the freedom of commerce mandated by the Treaty of Amity. In its defence, the United States raised, among other arguments, Art. XX(1)(d) of the Treaty, which states that the Treaty would in no event preclude measures by either party necessary to protect essential security interests.[8] In its 2003 decision on the merits, the Court took that ball and ran with it. In the reasoning of its Opinion, the Court began with the United States defence, rather than the complaint itself. The Court explained:

> "[I]t appears to the Court that there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1(d), before turning to Article X, paragraph 1. It is clear that the original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force (...). Furthermore, as the United States itself recognizes in its Rejoinder, "The self-defence issues presented in this case raise matters of the highest importance to all members of the international community", and both Parties are agreed as to the importance of the implications of the case in the field of the use of force, even though they draw opposite conclusions from this observation. The Court therefore considers that, to the extent that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty authorizes it to examine and rule on such issues, it should do so."[9]

The question, of course, was precisely whether or to what degree the Treaty of Amity conferred jurisdiction on the Court to pass judgment on the use of force, despite the otherwise narrow grounds for complaint accorded by the

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[6] *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objection, 1996 I.C.J. 803.

[7] Opinion, paras. 1-11, 31. The allowance of the United States counterclaim in itself represented a significant development of the Court's procedural rules, though I do not focus on that here. See S.M. Young, *Destruction of Property (On an International Scale): The Recent Oil Platforms Case and the International Court of Justice's Inconsistent Commentary on the Use of Force By the United States*, 20 N.C. J. Int'l L. & Com. Reg. 335, 338 (2004).

[8] Opinion, para. 32.

[9] *Idem*, para. 37.

Treaty. Having signalled its intention to effect such judgment, the Court equated the term "necessary to protect essential security interests" with the standard for self-defence under customary law and Art. 51 of the Charter of the United Nations (UN Charter), thereby decoupling its judgment from the Treaty of Amity. With recourse instead to international law generally, the Court found the actions of the United States not to qualify as legitimate acts of self-defence, but inappropriate uses of force. Having thus dismissed the defence, the Court then turned back to the complaint – and dismissed that as well. Ultimately, the Court held that the actions of the United States did not constitute an infringement of commerce between the two countries as contemplated by the terms of the Treaty of Amity any more than they constituted legitimate self-defence.

The Court's decision to review a defence before the substance of the complaint was telling. Still more provocative, the Court began its *dispositif*, the operational portion of its opinion, by repeating its rejection of the United States' defence, despite having already signalled in its reasoning that Iran's substantive claim was without merit.[10] As a matter of operational decision, logic suggests that a meritless complaint entails no defence. Judge Kooijmans emphasises the irregularity with a review of Court precedent:

> "The operative part does not immediately respond to the claim as formulated by the Applicant, but starts with a finding not essential to the Court's decision on that claim (…). I have checked the operative parts of all judgments of this Court and its predecessor, the Permanent Court of International Justice, in contentious cases and none of them starts with a finding that is not determinative for the Court's disposition of the claim."[11]

Following the *Rechtspolitik* of Judge Simma, however, the decision was not provocative enough: "the Court has fulfilled what I consider to be its duty (…) with inappropriate restraint".[12]

Judge Simma's choice of words succinctly suggest the crucial question: what is the duty of the Court? A question of jurisdiction is a question of the powers available to a court – and with powers available, duty incumbent – but the Court misses this line of inquiry by concentrating instead on the "original dispute". Judge Ranjeva, sympathetic to the Court's method, perhaps unwittingly suggests the dangers of attempting to purport a real or original dispute independent of the formal pleadings. He applauds overcoming "artificial" aspects of the case, but concedes that "[d]efining the 'cause' of a claim – the underlying reason therefore – is a controversial issue

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[10] *Idem*, *Dispositif* para. (1).

[11] Kooijmans, para. 3. And see the opinion of Judge Parra-Aranguren at para. 13: "the Court should have considered Article XX, paragraph 1(d), as a defence to be examined only in the event of its having previously established that the United States had violated Article X, paragraph 1, of the 1955 Treaty".

[12] Simma, p. 325.

in doctrine because of the notion's malleable character and metaphysical connotations".[13] The somewhat mystical suggestion of divining a complaint is not helped when he explains that "[i]n thus going directly to the real heart of the dispute, the Court has complied with its obligation (…) to make a true interpretation of substantive law", whatever that means.[14]

Judge Elaraby also adopts the focus of the Court: "The case, in essence, is about international responsibility. It evolves around whether it is permissible for a State to use force against another State outside the boundaries defined by the Charter of the United Nations".[15] This was indeed the issue Iran wanted to litigate, as Judge Higgins explained:

> "The Court was in 1996 well aware that there was a general dispute between the Parties in which each claimed unlawful uses of force by the other. Certainly Iran has been interested in seeking a basis of jurisdiction that could allow it to proceed with substantive claims relating to the United States' uses of force. The emphasis put by Iran, in the preliminary objections, on Article I of the Treaty was but one element of many evidencing that its real and only interest lay in the use of force."[16]

As Judge Owada points out, it is in the nature of a court of limited jurisdiction – rather than a court with plenary authority to rule as it pleases – that "the dispute before the Court is as defined by the Parties in their submissions to this Court. The so-called 'original dispute between the Parties' has no direct legal relevance to this dispute before the Court."[17] Moreover, the scope of the dispute before the Court was the subject of the 1996 Judgment, prompting Judge Higgins likewise to observe that

> "'[t]he original dispute' is of no relevance at the present time and it is inappropriate that in 2003 the Court should now treat Article X, paragraph 1, as an afterthought to 'the original dispute' over which in 1996 it did not find it had jurisdiction (…). Invocations of the 'original dispute' and 'importance' of subject-matter cannot serve to transform a contingent defence into a subject-matter that is 'desirable' to deal with in the text of the Judgment and in the *dispositif*".[18]

In formally purporting to remain within the jurisdiction conferred by the Treaty of Amity, while nonetheless basing the substance of its opinion squarely on the use of force as a matter of international law, the Court effectively outstripped its own institutional capacity. Moreover, by doing so in a manner ultimately irrelevant to the disposition of the case, the Court made relatively clear an expansive interest in its own authority.

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[13] Ranjeva, para. 6.
[14] *Idem*, para. 3.
[15] Elaraby, para. 1.1.
[16] Higgins, para. 19.
[17] Owada, para. 12.
[18] Higgins, paras. 22-23.

The expansive interest attributable to the Court makes up the better part of the dispute among the judges in the remarkable number of separate opinions attached to the case. Judges Higgins, Parra-Aranguren, Kooijmans, Buergenthal and Owada all expressed discomfort or disapproval with the Court's principal ruling on the use of force under international law; Judges Ranjeva and Koroma wrote separately to support the ruling; and Judges Al-Khasawneh, Elaraby, Simma and Rigaux all wrote to indicate that the Court could and should have gone still farther in taking the opportunity to pronounce on violations of the international legal prohibition on the use of force. Among the latter four, Judges Elaraby and Simma were most pronounced in their discontent with the scope of the Court's ruling, and between the two, Judge Simma was most comprehensive and visionary in his statement of the powers available to the Court. His opinion serves as a sort of key by which to understand the startling different visions among the various judges of the role and powers of the ICJ and the nature of the international system generally. Before proceeding to Judge Simma's opinion, it is useful to review the substance of the Court's use of force decision; I turn to that now.

III. Use of Force

Considered independent of the complex of concerns caught up with the jurisdictional question, much of the Court's reasoning on self-defence is not terribly controversial. Likewise, the first, critical manoeuvre to draw on international law is not unreasonable:

> "[U]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force."[19]

The Court proceeds along two principle lines of inquiry. First, the United States was called on to demonstrate that it was the victim of an armed attack, requiring a showing of (a) substantial aggressive force, pursuant to which (b) the attack must have been attributable to Iran, with (c) the specific intent to strike the United States. Second, the United States was called on to demonstrate that its actions were (a) necessary and (b) proportionate, according to which the Court also included inquiry into (c) the nature of the targets of defensive force.

The armed attacks to which the United States responded must have been "of such a nature as to be qualified as 'armed attacks' within the meaning of that

[19] Opinion, para. 41.

expression in Article 51 [of the UN Charter] (…) and as understood in customary law on the use of force".[20] The Court emphasised the distinction between "the most grave forms of the use of force", qualifying as armed attacks, and "other less grave forms", which will not qualify for purposes of Art. 51. Moreover, as noted, the Court linked the armed attack threshold to a showing of specific intent on the part of Iran. The Court explains: "the question is whether [the] attack, either in itself or in combination with the rest of the "series of (…) attacks" cited by the United States can be categorised as an "armed attack" on the United States justifying self-defence". The Court notes first that the Sea Isle City was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters. Secondly, the Texaco Caribbean, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State (…). [And t]here is no evidence that the minelaying alleged to have been carried out by the Iran Ajr, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the Bridgeton was laid with the specific intention of harming that ship, or other United States vessels.[21]

Accordingly, the United States with respect to both incidents failed to establish that it was the victim of an armed attack under international law sufficient to allow unilateral action in self-defence.[22] The demand for proof of specific intent on the part of Iran to strike the United States in particular was not uncontroversial, but holds obvious appeal within the context of the UN collective security system: the ruling bars self-help and avoids escalation in the face of generalised violence, presumptively vesting an exclusive responsive right with the collective apparatus of the UN.

The Court proceeded to the criteria of necessity and proportionality, despite the failure by the United States to meet the armed attack threshold. The analysis of both criteria, however, is somewhat thin. Both appear to come down to the Court's controversial use of the evidence on the record, and its equally problematic reliance on the nature of the target of the defensive force. As regards proportionality, the Court simply states that the 1987 actions might indeed have met proportionality (the point is moot because the armed attack threshold was not met), but goes on to say of the 1988 incident, in conclusive fashion, that

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[20] *Idem*, para. 51.

[21] *Idem*, para. 64.

[22] The same conclusion can be put otherwise by unbundling the various elements of the Art. 51 inquiry, particularly the components of severity and responsibility. Thus, Pieter Bekker, reviewing the case, writes of the minelaying allegation, "the Court concluded that, although it fell within the meaning of 'armed attack' in Article 51 of the UN Charter and as understood in customary law on the use of force, the mining of the U.S.S. *Samuel B. Roberts* was insufficient in itself to amount to such an attack by Iran that would justify U.S. action in self-defense". Pieter H. F. Bekker, *International Decisions*, David D. Caron, (ed.), 98 *Am. J. Int'l L.* 550, 53 (2004).

> "[a]s a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence".[23]

As regards necessity, the Court "notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act".[24]

The quoted passage on necessity seems to indicate that the record might establish necessity with respect to Iran's minelaying activities and attacks on neutral shipping – the primary acts complained of in the incidents of April, 1988, and Oct., 1987, respectively – but that necessity was not met with specific reference to the platforms elected as targets for defensive response. In part this was due to finding that the United States did not carry a burden of proof to show that the oil installations were being used for aggressive military purposes: the Court held, without further defining its evidentiary standard, that while the United States' showing was "suggestive", even "highly suggestive", it was not conclusive.[25] With respect to the Court's focus on the nature of the defensive target, however, the terminology raises a potentially troubling confusion of *jus ad bellum* and *jus in bello*. The Court held: "One aspect of [the criteria of necessity and proportionality] is the nature of the target of the force used avowedly in self-defence".[26] Proportionality by any recognised use under the *jus ad bellum* will inevitably take account of the contemplated targets, but the term itself is generally reserved for humanitarian law: confusion between the two effects confusion between the right to respond in self-defence, and the nature of the activities allowed once that right is ascertained. It is beyond the scope of this paper to explore such confusion, but I note that the Court's reasoning shows less than thorough sensitivity to distinctions across the two fields of law. Accordingly, the Court's lack of clarity in its discussion of necessity, proportionality and targeting standards opened the door to the critical response by William H. Taft, legal advisor to the United States:

> "There is no requirement in international law that a State exercising its right of self-defence must use the same degree or type of force used by the attacking State in its most recent attack. Rather, the proportionality of the measures taken in self-defence is to be judged according to the nature of the threat being addressed.".[27]

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[23] Opinion, para. 77.
[24] *Idem,* para. 76.
[25] *Idem*, paras. 59, 71.
[26] *Idem*, para. 74.
[27] William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 Yale J. Int'l L. 295, 305 (2004).

To draw this discussion to a close, however, the Court's opinion in sum – though achieving less than perfect clarity in all respects – suggests a strong affirmation of the commonplace ban on reprisals, though the Court does not use that term. Judge Elaraby likewise states that "the United States military action against Iran must be considered as military reprisals" and regrets that the Court was not more explicit on that ground by way of *obiter dictum*.[28] Judge Simma shared similar discontent; I turn to his opinion at last.

IV. Judge Simma's Opinion

Judge Simma indicates his satisfaction with the Court's opinion, as well as his discontent, when he applauds the "confirmation, albeit too hesitant, of the *jus cogens* of the United Nations Charter".[29] The overriding consideration, for Judge Simma, is one of "*Rechtspolitik*", according to which the Court has rightly "taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state its view on the legal limits on the use of force at a moment when these limits find themselves under the greatest stress".[30] The statement is baldly political in nature, and explicitly endorses opportunism in pursuit of an ends particular to the interests of the Court. Moreover, given that the moment of decision occurs fifteen years after the moment of controversy before the Court, Judge Simma's language suggests pushing the Court's review beyond the more or less narrow parameters of the case at hand, making expedients of the parties and controversy.

Needless to say, Judge Simma's Opinion represents a radical break from traditional judicial method. His is a broader interest in policy and politics: "From the viewpoint of legal policy and political relevance (…) there can be no doubt that in the present case the emphasis is squarely on the question of the legality *vel non* of the use of armed force by the United States against the oil platforms".[31] By reference to the policy and politics attendant on the outcome of the Court's decision, Judge Simma avoids the ontological distraction of discerning the true or original complaint between the parties. The distinction is at once subtle and broad: like Judge Ranjeva, Judge Simma suggests that adjudicating the use of force was more important than adjudicating the pleadings on their face; Judge Simma, however, is not confined to justifying his Opinion by reference to the parties or their dispute, with recourse instead to a policy concerned with matters of "political relevance", wholly external to the record. The question, then, is on what grounds, according to what powers and what policy, does the Court account for political relevance in its role as tribunal?

[28] Elaraby, para. 1.2.
[29] Simma, p. 325.
[30] *Idem*, p. 325.
[31] *Idem*, para. 3.

In answer, Judge Simma falls back on principle and a sense of significance: "I consider it of utmost importance, and a matter of principle, for the Court to pronounce itself on questions of the threat or use of force in international relations whenever it is given the opportunity to do so".[32] Thus:

> "We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter. In this debate, "supplied" with a case allowing it to do so, the Court ought to take every opportunity to secure that the voice of the law of the Charter rise above the current cacophony."[33]

Judge Owada, however, counters that "it is crucial to keep in mind that in the present case the competence of the Court is limited to the examination of the claims of the Applicant under Article X, paragraph 1, and does not extend to the examination of a broader and general problem of self-defence under general international law as such."[34] Competence, in Judge Owada's formulation, is more than a formal constraint: it captures institutional limitation in actual fact. Thus, he continues,

> "while it is of the utmost importance for the Court to pronounce its authoritative position on this general problem in the proper context, it should do so in a context where it should be possible for the Court to deal with problem squarely in a full-fledged manner, with all its ramifications both in terms of the law and the facts involved.".[35]

The Court is at once bound by the contrasting universal and particular aspects of its adjudication: the power to effect universal rules should call for restraint in application to a particular problem stated according to a particular record developed by parties with interests particular to themselves.

Judge Buergenthal, along with Judge Higgins, raises the *non ultra petita* rule (roughly translated as 'not more than asked for'): "the function of the *non ultra petita rule* is to ensure that the Court does not exceed the jurisdictional confines spelled out by the parties in their final submissions".[36] Judge Simma contemplates a Court tasked with defending the Law, Judge Buergenthal a Court tasked with administering the law. The former accords the Court an active pre-eminence; the latter subjugates the Court to a system calibrated among divergent actors and interests. Judge Buergenthal cites approvingly from Fitzmaurice: "The *non ultra petita* rule is not only an inevitable corollary – indeed, virtually a part of the general principle of consent of the parties as the basis of international jurisdiction – it is also a necessary rule, for without

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[32] *Idem*, para. 5.
[33] *Idem*, para. 6.
[34] Owada, para. 37.
[35] *Idem*, para. 38.
[36] Buergenthal, para. 8.

it the consent principle itself could constantly be circumvented".[37] Judge Simma, for his part, states:

> "I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency."[38]

Judge Higgins, on the other hand, asks "conversely, if the use of force on armed attack and self-defence is to be judicially examined, is the appropriate way to do so through the eye of the needle that is the freedom of commerce clause of a 1955 FCN Treaty?".[39] She answers her own question in the negative: "These questions are of such a complexity and importance that they require a different sort of pleading and a different type of case".[40]

Dissonance lingers in the twin objections of Judges Higgins and Buergenthal. The subject matter is too important or the system too carefully calibrated, the one and the other suggest, to reach beyond the jurisdictional bounds of the Court. The latter, however, denies the relevance of the former, and vice versa, such that the one must hold sway to the detriment of the other as a matter of law. The Court is caught in the middle. In the meantime, Judge Simma forcefully laments:

> "What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force."[41]

Even here, though, some temperance is in order: the international rules on the use of force have been reported dead before, and the concern has been exaggerated, if not always greatly.[42]

Conclusion

Less than a year after announcing the *Oil Platforms* decision, the ICJ announced its advisory opinion concerning 'Legal Consequences of the

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[37] *Idem*, para. 8, citing Geral Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. II, p. 529 (1986).
[38] Simma, para. 6.
[39] Higgins, para. 26.
[40] *Idem*, para. 26.
[41] Simma, para. 6.
[42] *See, e.g.*, Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L. 809, 820-21 (1970); and Louis Henkin, The Reports of the Death of Article 2(4) Are Greatly Exaggerated, 65 Am. J. Int'l L. 544 (1971).

Construction of A Wall in the Occupied Palestinian Territory'.[43] Israel declined to address the case on the merits, suggesting disapproval that the Court was being used as a political football.[44] The precise procedural issues were different from those of *Oil Platforms*, but the general controversy over the propriety of the Court's review was similar. And the world today is confronted with the ongoing violence in Gaza: did the *Wall* Opinion help or hinder matters? Was the international system served by the Court's opinion or undermined by it? There are no clear answers to these questions – it is not even certain that these are the right questions to be asking, and it is well beyond the scope of this note to turn to the *Wall* Opinion now in any substance. I raise the case in broad outline here as illustration because the questions put are raised forcefully by the Court and judges in the *Oil Platforms* Opinion, alongside differing visions of the international system and the ICJ's role in it. They demand engagement, even if they defy resolution.

[43] *Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory* (Advisory Opinion), 43 I.L.M. 1009 (2004) (*Wall* Opinion).
[44] *Idem* paras. 36, 46.